

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DARRYL LEE CHERRY,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. 04-292 ERIE
)	
UNITED STATES OF AMERICA,)	JUDGE MCLAUGHLIN
DR. OLSON, FCI-MCKEAN,)	MAGISTRATE JUDGE BAXTER
DR. BEAM, FCI-MCKEAN, MR. SMITH,)	
HOSPITAL ADMINISTRATOR,)	Electronically Filed
JAMES F. SHERMAN, WARDEN)	
FCI-MCKEAN, D. SCOTT DODRILL,)	
REGIONAL DIRECTOR,)	
HARRELL WATTS, ADMINISTRATOR,)	
NEWTON E. KENDIG,)	
BOP MEDICAL DIR.)	
)	
Defendants.)	

**DEFENDANTS' MOTION TO DISMISS
OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rules 12(b)(1), 12(b)(2), 12(b)(6) and 56(c) of the Federal Rules of Civil Procedure, defendants the United States of America, Dr. Olson, FCI-McKean, Dr. Beam, FCI-McKean, Mr. Smith, Hospital Administrator, James F. Sherman, Warden FCI-McKean, D. Scott Dodrill, Regional Director, Harrell Watts, Administrator and Newton E. Kendig, BOP Medical Director, file the following Motion to Motion to Dismiss Or, In The Alternative, Motion For Summary Judgment, and in support thereof state as follows:

1. Plaintiff Darryl Lee Cherry filed this *pro se* lawsuit alleging that he received inadequate medical care from defendants in connection with the treatment of his Hepatitis C virus while he was incarcerated at a Federal Correctional Institution in McKean County, Pennsylvania (“FCI McKean”).

2. Specifically, plaintiff's Amended Complaint asserts a claim for negligence under the Federal Tort Claims Act, 28 U.S.C. § 2670 *et seq.* ("FTCA"), and a claim pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) alleging that defendants violated his Eighth Amendment right to be free from cruel and unusual punishment.

3. Plaintiff has named as defendants the United States of America and seven (7) individuals (the "Individual Defendants") as follows: (i) Dennis Olson, M.D., Clinical Director of FCI McKean; (ii) Herbert Beam, M.D., Staff Physician, FCI McKean; (iii) Rodney Smith, Health Services Administrator, FCI McKean; (iv) James Sherman, Warden, FCI McKean; (v) D. Scott Dodrill, Federal Bureau of Prisons ("BOP"), Northeast Regional Director; (vi) Harrell Watts, National Inmate Appeals Administrator; and (vii) Newton Kendig, BOP Medical Director.

4. As a result of defendants' alleged negligence and deliberate indifference, plaintiff seeks total damages in the amount of \$35 million.

5. The Court, however, should dismiss plaintiff's *Bivens* claim or grant summary judgment in favor of defendants as to this claim for the following reasons: (i) this Court lacks personal jurisdiction over two of the Individual Defendants, Watts and Kendig; (ii) plaintiff cannot prove the "deliberate indifference" necessary to assert a claim under the Eighth Amendment against any of the Individual Defendants; and (iii) even if plaintiff could show a constitutional violation, defendants are entitled to qualified immunity because the allegations do not amount to the violation of a clearly established constitutional right.

6. The Court should also dismiss plaintiff's FTCA claim as to the Individual Defendants, because they are not proper parties to such a claim. Moreover, the FTCA claim

should be dismissed in its entirety because plaintiff failed to exhaust his administrative remedies prior to filing suit.

7. Defendants' Brief in support of this Motion, together with accompanying Exhibits, are incorporated in this Motion by reference.

WHEREFORE, defendants respectfully request that the Court issue an order granting their motion and dismissing plaintiff's Amended Complaint with prejudice or, in the alternative, entering summary judgment in defendants' favor as to all claims contained therein.

A proposed order is attached

Respectfully submitted,

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